IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
January 30, 2007 Session

STATE OF TENNESSEE v. TERRY D. JONES

Appeal from the Criminal Court for Knox County
No. 75855 Mary Beth Leibowitz, Judge

No. E2006-00228-CCA-R3-CD - Filed May 24, 2007

The defendant, Terry D. Jones, appeals a certified question of law regarding a police officer's stopping the vehicle he was driving, resulting in his arrest and charges for possession with intent to sell more than 26 grams of cocaine (count one), *see* T.C.A. § 39-17-417 (2006), possession with intent to deliver more than 26 grams of cocaine (count two), *see id*., evading arrest (count three), *see id*. § 39-16-603, resisting arrest (count four), *see id*. § 39-16-602, and public intoxication (count five), *see id*. § 39-17-310. Considering our standard of review, we agree with the Knox County Criminal Court that reasonable suspicion supported by specific and articulable facts existed for the stop, and we affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Criminal Court is Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JERRY L. SMITH, J., joined.

A. Philip Lomonaco, Knoxville, Tennessee, for the Appellant, Terry D. Jones.

Robert E. Cooper, Jr., Attorney General & Reporter; Cameron L. Hyder, Assistant Attorney General; and Randall E. Nichols, District Attorney General, for the Appellee, State of Tennessee.

OPINION

On January 17, 2006, the defendant pleaded guilty in the Knox County Criminal Court to possession with the intent to sell more than 26 grams of cocaine, a Class B felony. *See* T.C.A. § 39-17-417 (2006).[1] The court imposed a sentence of 10 years in the Department of Correction and a $2,000 fine. With the State's and the trial court's agreement, the defendant specifically reserved the right to appeal a dispositive question of law pursuant to Tennessee Rule of Criminal Procedure 37(b)(2)(1). *See* Tenn. R. Crim. P. 37(b)(2)(1) ("An appeal lies . . . from any

[1] Count two, possession with intent to deliver more than 26 grams of cocaine, merged with count one, and counts three through five were dismissed by the State.

judgment of conviction . . . upon a plea of guilty . . . if . . . [d]efendant entered into a plea agreement under Rule 11(e) but explicitly reserved with the consent of the state and of the court the right to appeal a certified question of law that is dispositive of the case."). As recited in the judgment of conviction, the issue reserved for review is: "Did the trial court [err] in denying the defendant's motion to suppress [the fruits of] the stop and detention of the defendant the night of his arrest, and was [there] a lack of probable cause, or reasonable suspicion for the stop in violation of the United States and Tennessee Constitution[s ?]" We conclude that the record supports the trial court's denial of the suppression motion.

We have extensively reviewed the record, including the audiotapes and videotapes, relating to the stopping of the defendant's vehicle. Viewed in the light most favorable to the State, as the prevailing party, *see State v. Daniel*, 12 S.W.3d 420, 423 (Tenn. 2000), the proof at the July 15, 2004 suppression hearing showed that on October 2, 2001, Knoxville Police Department Officer Melvin Pierce and trainee Officer Anthony Barnes initiated a traffic stop because an automobile was impeding traffic flow in front of Max's Lounge, located at the corner of Harrison Street and Wilson Avenue in Knoxville. The officers observed a female passenger exit the car and enter Max's Lounge. Upon investigation, the officers received permission from the car's driver to search the vehicle, and they found drug paraphernalia. When the officers attempted to enter Max's Lounge to speak with the female passenger, the doors were locked, and no one responded to their repeated knocking.

At some point, Officers Pierce and Barnes called for assistance, and Officers Joseph Mattina, Larry Jason Jones, Doyle Lee, and Sergeant Tammy Hamblin responded. The police officers suspected criminal activity inside Max's Lounge, but they reiterated they only wanted to enter to find the female passenger. The officers also observed several open alcohol containers in the parking lot, and several of the parking lot's cars had registration violations and improper license tags. During their subsequent attempts to enter the lounge, the officers contacted a fire marshal and learned that the lounge was not "per se a business, [but] a private club, [which] could restrict entry." The officers also attempted to gain access via a beer inspector, yet this attempt also failed. Therefore, the officers decided to stand by and observe from a location approximately one and one-half blocks north of the lounge.

The officers observed the lounge's front porch lights flash on and off, and a person exited the lounge, walked around the building, and re-entered the lounge. The officers assumed that the person was looking for them. Seconds after the person re-entered the lounge, a neighbors' house lights came on, and then people began to exit the lounge.

Officer Lee informed the other officers of the exodus, and Officer Mattina was the first officer to stop a vehicle leaving the parking lot. Officers Pierce and Barnes drove south on Harrison Street to ensure Officer Mattina's safety, passing the lounge on their right. When they learned that Officer Mattina did not need assistance, they drove north on Harrison, passing the lounge on their left. Officers Pierce and Barnes both testified that at this point, they observed the defendant walking from the lounge's porch towards a Toyota Corolla, and he appeared to be

intoxicated because "[h]e was unsteady on his feet[and] had a staggered gait."[2] The testimony is somewhat confusing as to where they drove next, especially since Officers Pierce and Barnes both testified that they could not remember the route they took to effectuate the stop. However, we discern from the record that they continued north on Harrison, made a series of right turns, turned onto Wilson Avenue, and from Wilson Avenue, they drove into Max's parking lot and parked behind the Toyota Corolla, preventing its departure.

As they pulled into the parking lot, a police car was already present. Again the testimony is somewhat unclear as to whether another officer was on the lounge's porch[3] and provided assistance to Officers Pierce and Barnes. Nonetheless, the officers approached the vehicle and spoke with the defendant. Both officers testified that they smelled alcohol, that the defendant's eyes were bloodshot, that his speech was slurred, and that he was "digging at his waistband and in his pockets." Also, the defendant had difficulty exiting his vehicle because he was "extremely unsteady," and he refused to follow the officers' commands. Shortly after exiting the vehicle, the defendant ran in an easterly direction. After a foot chase, the officers caught the defendant. During the chase, Officer Barnes observed the defendant "digging in his pockets" and saw him drop something behind a heat pump. After the chase, Officer Barnes discovered a "baggy" containing approximately 131 grams of cocaine powder behind the heat pump. The officers also found loose crack cocaine rocks and $2,081 cash on the defendant's person.

The trial court denied the defendant's motion to suppress any evidence of drug possession, finding that Officers Pierce and Barnes effected a traffic stop in front of Max's Lounge which led to further investigation of the lounge by Officers Pierce and Barnes and four other police officers in a total of four patrol cars.

The court found that when the officers failed to enter the lounge, "they lined up in the dark and waited to see what was going to happen and waited to see who came out."

The court found that Officer Mattina stopped the first vehicle after Officer Lee notified him that people were leaving the lounge and that Officers Pierce and Barnes approached Officer Mattina to ensure his safety. The court then found that Officers Pierce and Barnes "patrolled about four square blocks thereabout" at some point returning to Max's and observing the defendant. "As they approached Max's Lounge and they observed wherever they observed, there was already

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[2]We note that Officer Pierce changed his testimony after watching his patrol car's videotape. He then testified that he must have seen the defendant walk to his car not while driving north on Harrison but after circling and returning to the lounge via Wilson Avenue.

[3]Neither Officer Pierce nor Officer Barnes could identify the figure on the porch as Sergeant Hamblin; moreover, Sergeant Hamblin testified that she did not remember being on the porch. However, Officer Pierce did testify that at some point, Sergeant Hamblin was on the lounge's porch, and Officer Barnes testified that he "assume[d]" it was Sergeant Hamblin on the porch after viewing the videotape. Furthermore, a proffered videotape, which was not identified by Sergeant Hamblin as being her patrol car's videotape of that night although it bore her name, did show a female in a police uniform drive into the lounge's parking lot, exit the vehicle, walk to the lounge's porch, and shine her flashlight on the Toyota Corolla shortly before Officers Pierce and Barnes arrived.

an officer's car in the parking lot, according to the videotape." The court stated that there was a "figure" on the porch who assisted the officers with a flashlight. The court found that the defendant was in the car, and Officer Barnes approached the car appropriately. The court stated, "And the rest, I think, is basically not in contest what happened after that."

In sum, the trial court found that Officers Pierce and Barnes observed the defendant in an "alcoholic state." The court emphasized that the officers could have observed the defendant while traveling north or south and that by the time they came back to Max's, the defendant "was already seated in the car." The court stated, "What they observed and whether they observed him coming off the porch, I can only tell from their testimony. And I have no reason to disbelieve that they in fact did observe him." Furthermore, the court found that from the time the defendant stepped out of the car his "behavior was erratic enough as to put them in both fear of their safety, as well as to give them suspicion that there was either weapons or drugs involved." The defendant ran, and after being caught, the officers found drugs. The court, therefore, denied the motion to suppress.

The defendant pleaded guilty to possession with the intent to sell more than 26 grams of cocaine, *see* T.C.A. § 39-17-417, reserving the certified question of law, "Did the trial court [err] in denying the defendant's motion to suppress [the fruits of] the stop and detention of the defendant the night of his arrest, and was [there] a lack of probable cause, or reasonable suspicion for the stop in violation of the United States and Tennessee Constitution[s ?]" We agree that this question is dispositive. *See* Tenn. R. Crim. P. 37(b)(2)(1); *State v. Pendergrass*, 937 S.W.2d 834, 837 (Tenn. 1996); *State v. Preston*, 759 S.W.2d 647, 650 (Tenn. 1988). The defendant disputes the trial court's finding of reasonable suspicion, and the matter is properly before us for review.

A trial court's factual findings on a motion to suppress are conclusive on appeal unless the evidence preponderates against them. *State v. Binette*, 33 S.W.3d 215, 217 (Tenn. 2000); *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). Thus, questions of credibility, the weight and value of the evidence, and the resolution of conflicting evidence are matters entrusted to the trial judge, and this court must uphold a trial court's findings of fact unless the evidence in the record preponderates against them. *Odom*, 928 S.W.2d at 23; *see also* Tenn. R. App. P. 13(d). The application of the law to the facts, however, is a question that an appellate court reviews de novo. *State v. Keith*, 978 S.W.2d 861, 864 (Tenn. 1998). We review the issue in the present appeal with these standards in mind.

Both the United States and Tennessee Constitutions protect against unreasonable searches and seizures. U.S. Const. amend IV; Tenn. Const. art. 1, § 7. A search or seizure conducted without a warrant is presumed unreasonable, thereby requiring the State to prove by a preponderance of the evidence that the search or seizure was conducted pursuant to an exception to the warrant requirement. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043 (1973); *State v. Simpson*, 968 S.W.2d 776, 780 (Tenn. 1998).

One exception to the warrant requirement exists when a police officer makes an investigatory stop based upon reasonable suspicion, supported by specific and articulable facts, that

a criminal offense has been or is about to be committed. *See Terry v. Ohio*, 392 U.S. 1, 20-21, 88 S. Ct. 1868, 1880 (1968); *State v. Bridges*, 963 S.W.2d 487, 492 (Tenn. 1997). Probable cause is not required for such an "investigatory stop." *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880. *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S. Ct. 1391, 1401 (1979), established that generally police officers are entitled to stop a car briefly for investigative purposes if they have a reasonable suspicion, based upon specific and articulable facts, that an offense is being or is about to be committed. *Id*. A reviewing court then must take into account the totality of circumstances when analyzing whether an officer's suspicion is "reasonable" and supported by specific and articulable facts. *State v. Yeargan*, 958 S.W.2d 626, 632 (Tenn. 1997). Circumstances relevant to that determination include, but are not limited to, the officer's "personal objective observations" and "the rational inferences and deductions that a trained officer may draw from the facts and circumstances known to him – inferences and deductions that might well elude an untrained person." *Keith*, 978 S.W.2d at 867.

On appeal, the defendant argues that Officers Pierce and Barnes did not have reasonable suspicion to stop and detain him because the officers, prior to the stop, had decided to stop every person leaving Max's Lounge. There was evidence that Officer Mattina directed that the officers should stop people leaving Max's Lounge "one by one" after the officers' attempts to enter the lounge failed. However, our concern is whether the officers had a reasonable suspicion to stop this particular defendant and the exact circumstances surrounding him only. Furthermore, the defendant asserts that the officers fabricated their testimony that they observed him staggering to his vehicle, claiming that videotaped evidence proves that the officers' testimony was untrue.

First, Officer Pierce testified that he intentionally pulled his patrol car behind the defendant's vehicle, preventing the defendant's departure, because he feared that "to allow [the defendant] to get in the vehicle and leave would be a danger to the public." As the State and the defendant agreed in the certified question, this detention constituted a *Terry* stop which required reasonable suspicion. *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880.

Second, the trial court credited the officers' testimony and found that Officers Pierce and Barnes observed the defendant staggering to his vehicle. We note that the videotapes from the various patrol cars and the audiotapes do not clearly indicate when this observation was made or if it was made. However, the trial judge specifically made a credibility finding in favor of the officers' testimony and stated that she found no reason to disbelieve them.

Upon entering the vehicle, the defendant started the ignition. Again, the officers suspected the defendant of public intoxication, *see* T.C.A. § 39-17-310, and they feared that the defendant was about to commit the offense of driving under the influence, *see id*. § 55-10-401. The officers both testified that the defendant smelled of alcohol, had bloodshot eyes, slurred his speech, and was unsteady on his feet. The trial court credited this testimony also.

At this point in the progression of events in the parking lot, the officers had acquired probable cause to arrest the defendant at least for attempted driving under the influence. *See, e.g., State v. Melvin B. Dobbins*, No. M2005-01987-CCA-R3-CD, slip op. at 5 (Tenn. Crim. App.,

Nashville, Jan. 5, 2007) (commenting that when an intoxicated driver is in control of an automobile in a closed park and the driver drives to the exit towards a public street, the driver may be guilty of attempted driving under the influence). The contraband was ultimately discovered incidentally to the arrest of the defendant. *See Chimel v. California*, 395 U.S. 752, 763, 89 S. Ct. 2034, 2040 (1969) (establishing an exception to the search warrant requirement for searches incidental to lawful arrests); *see also United States v. Robinson*, 414 U.S. 218, 235, 94 S. Ct. 467, 477 (1973); *State v. Walker*, 12 S.W.3d 460, 467 (Tenn. 2000); *State v. Crutcher*, 989 S.W.2d 295, 300 (Tenn. 1999).

Finally, after reviewing the entire record, we cannot conclude that the evidence preponderates against these findings; however, we do recognize that the officers' spotty memories and testimony bolster the defendant's concerns. Nevertheless, we hold that there was reasonable suspicion based upon specific and articulable facts to stop the defendant. Subsequently to the stop, legally justifiable steps led to the discovery of the defendant's possession of the contraband.

For the reasons we have discussed, we conclude that the record supports the denial of the defendant's motion to suppress. The judgment of the trial court, accordingly, is affirmed.

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JAMES CURWOOD WITT, JR., JUDGE